92-1452

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHARLIE MAE BOWENS,
Petitioner/Claimant,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals erred when it granted the government's motion to dismiss petitioner's appeal on the ground that, when the United States sold the *res* during pendency of the appeal, the Court of Appeals lost jurisdiction in the *in rem* forfeiture proceeding.

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PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Charlie Mae Bowens respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered on the 18th day of December 1992, summarily dismissing petitioner's appeal.

OPINION BELOW

The opinion (per curiam) granting the motion of the United States to dismiss the appeal has not been reported. A copy of the printed slip opinion is annexed hereto as 1a.

JURISDICTION AND TIMELINESS

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

The Judgment of the Court of Appeals dismissing Petitioner's appeal was issued 18 December 1992. This petition is therefore timely.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution in pertinent part reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

The Fifth Amendment to the United States Constitution in pertinent part reads:

> No person shall be . . . . deprived of . . . . property, without due process of law . . . .

STATUTES INVOLVED

Title 21 U.S.C. § 881(a) reads in pertinent part:

> "The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> "(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

STATEMENT OF THE CASE

(1) On 27 July 1989, a horde of drug agents entered Charlie Mae Bowens's home to search for drugs and drug paraphernalia. (3a)

Charlie Mae, 60 years old and half-blind, had never seen, much less trafficked in, drugs. (3a) For that matter, this was her first run-in with law enforcement officers.

Charlie Mae had never been arrested for any offense in her entire life. For that matter, she had not even been sued in her entire life. (3a)

Since she was 14, she had worked for a living. (3a)

For 11 years she cleaned homes for white folks. (3a)

For 2½ years she waited on table. (3a)

She spent a year doing just about everything in a cafeteria. (3a)

Two years were spent in a cotton mill. (3a)

Six were spent processing yarn in a carpet mill. (3a)

The last 20 years she ran her own beauty shop. (3a)

That's the way in which she had spent her years—without incident, without turmoil. Until 27 July 1989.

(2) In a chilling display of the "war against drugs," at 6:00 o'clock in the morning, they first busted down her door, and then bounced her around. Then they turned her house upside-down searching for drugs. They found nothing—not so much as a grain of any illegal substance. (3a)

Then, having concluded with foreplay, they got down to the real business at hand: pillaging. They snatched whatever indicia of wealth she had accumulated during a lifetime of struggle: her wedding ring, other meager

trinkets, family portraits, private papers, and her car. (4, 6a)

And then they left.

No charges whatever were ever filed against her.

(3) For about ten months she heard nothing. On 11 May 1990, they got around to telling her that the car was contraband and therefore subject to forfeiture. (7a)

Although Charlie Mae was indigent, she got ahold of a jackass lawyer whose specialty is tilting at windmills. He filed an answer in her behalf. (14a)

After months of discovery, the government moved for summary judgment. (17-26a) And the district court, almost three years after Charlie Mae's car was seized (14 February, 1992), granted the government's motion. (27a)

Charlie Mae promptly (February 26) filed a notice of appeal. (33a) And, suspecting the worst, on the same day she also filed a motion to stay the judgment pending appeal. Otherwise, she reasoned, the government would sell Charlie Mae's car during the pendency of the appeal and claim that, the *res* having been disposed of, the Court of Appeals was divested of *in rem* jurisdiction. (34a)

On the 10th day of March, the government, predictably, opposed Charlie Mae's motion. (36a) On the 17th of April, the district court granted the stay—on condition that Charlie Mae do the impossible: post a supersedeas bond in the amount of $12,987.00! (43a)

On the 27th day of May, Charlie Mae ran to the Court of Appeals with a motion for a stay. (45a) The very next day, 28th of May, the government, true to form, opposed it. (51a)

On July 17, the Court of Appeals denied Charlie Mae's Motion for Stay. (56a)

On the 5th of August, the government sold Charlie Mae's car. After the sale, the government, relying on

United States v. One Lear Jet Aircraft, 836 F.2d 1571, *cert. denied*, 487 U.S. 1204, 101 L. Ed. 2d 881, 108 S. Ct. 2844 (1988), moved to dismiss Charlie Mae's Appeal. (58a)

On 12 November 1992, Charlie Mae filed a motion in the Court of Appeals asking that it stay its decision until after this Court decided *Republic National Bank of Miami v. United States*, (No. 91-767), granting cert. to review the 11th Circuit's decision, 932 F.2d 1433. (60a)

On December 18, 1992, the Court of Appeals denied, as moot, the motion to stay pending this Court's decision in *Republic National Bank of Miami v. United States.* (61a)

The same day, the Court of Appeals granted the government's motion to dismiss. (1a)

REASONS FOR GRANTING THE WRIT

The decision below appears to be in direct and irrefutable conflict with this Court's decision in *Republic National Bank v. United States*, —— U.S. ——, 121 L. Ed. 2d 474 (1992).

In *Republic National Bank, supra*, this Court rejected the government's contention "that jurisdiction over an *in rem* forfeiture proceeding depends on continued control of the *res*." *Republic National Bank v. United States*, 121 L. Ed. at 482: "We . . . find no such established rule in our cases," this Court declared. *Republic National Bank v. United States*, 121 L. Ed. at 482.

To be sure, "a valid seizure of the *res* is a prerequisite to *initiation* of an *in rem* forfeiture proceeding." (*Id.*) But " 'continuance of possession' [is] not necessary to maintain jurisdiction over an *in rem* forfeiture action. . . ." (*Id.*)

"The rule invoked by the Government does not exist, and we see no reason why it should. The fictions of

in rem forfeiture were developed primarily to expand the reach of the courts and to furnish remedies for aggrieved parties . . . not to provide a prevailing party with a means of defeating his adversary's claim for redress." *Republic National Bank v. United States*, 121 L. Ed. at 483-484.

"In a civil forfeiture proceeding, where the Government has the power to confiscate private property on a showing of mere probable cause, the right to appeal is a crucial safeguard against abuse." *Republic National Bank v. United States*, 121 L. Ed. at 487.

CONCLUSION

The government's position is "transparently fallacious," *Republic National Bank v. United States*, 121 L. Ed. at 489 (Justice White, concurring).

Wherefore petitioner respectfully prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8219

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ONE 1987 CADILLAC,
VIN. NO. 1G6CD5185H4237660,
Defendant,

CHARLIE MAE BOWENS,
Claimant-Appellant,

ERNEST SWAIN,
Claimant.

Appeal from the United States District Court
for the Northern District of Georgia

[Filed Dec. 18, 1992]

Before HATCHETT, EDMONDSON, and COX, Circuit Judges.

BY THE COURT:

The appellee's motion to dismiss the appeal is GRANTED. Since appellant did not obtain a stay or post a supersedeas bond, the sale of the property in question under court order to a third party deprives this Court of *in rem* jurisdiction in this matter. *See United States v. Certain Real and Personal Property*, 943 F.2d 1292 (11th Cir. 1991).

APPENDIX B

STATE OF GEORGIA

COUNTY OF FULTON

AFFIDAVIT

Charlie Mae Bowens, being duly sworn, deposes and says:

I am 60 years old.

I have been working since I was 14.

I spent 11 years doing housework for one William J. Charles.

I was a waitress for 2½ years.

I worked in a cafeteria for a year.

I spent 2 years working in a cotton mill.

For 6 years I worked in a mill processing yarn for carpeting.

For 20 years I ran my own beauty shop on Auburn Avenue.

I have never been arrested in my entire life.

I've never been sued in my life.

I have always paid my bills. I owe no one a penny.

I have never seen, much less touched, used, or had any dealings whatever with drugs.

On November 17, 1986 my beloved brother, Frank Middlebrooks of Detroit, purchased for me an automobile. It pretty much represents, after 46 years of struggle, my worldly wealth.

On July 27, 1989, at about 6:00 A.M. a horde of people claiming to be drug agents busted down my door, propelled me into a wall, ransacked my home, confiscated

what little jewelry I've managed to accumulate in 60 years of living, and then seized my private papers and my car.

Why?

I need to know why, and how, this can happen in 1989, in the land of the free and the home of the brave?

According to Regina Bledsoe's affidavit, I am the mother of Ernest Swain and Jacquelyn Swain Morgan. That is true.

According to Regina Bledsoe's affidavit, Jimmy Lee Herring is my "long time companion." True.

According to Regina Bledsoe's affidavit, my son is involved in drug related activity. That may or may not be true. But even if true, what has that got to do with me?

According to Regina Bledsoe's affidavit, there are presently a number of drug related charges pending against my daughter. That is in part true; and it is in part false. For example, indictment No. Z 08872, charging my daughter with possession with intent to distribute cocaine and possession of marijuana was dismissed, with prejudice, on September 5, 1989 because the evidence against my daughter was planted by W.S. Thompson, the same W.S. Thompson currently enjoying a special relationship with the DEA. For that reason, the prosecutor, Assistant District Attorney, William Hawthorne, III would not go forward with the case.

Moreover, the charge of possession of a sawed-off shot gun in another case had been previously dismissed.

It is true that in April of 1989 or thereabouts, my daughter entered a plea of guilty to simple possession and was fined approximately $800.00.

But what does all of this have to do with me? My daughter has been living separate from me since she was

14 years of age. Parenthetically, Regina Bledsoe's statement that my daughter lived with me at the Washington Circle Apartments is false. My daughter has been living for the past 15 years at Martel Homes Housing Project, and it was not until after April 27th of this year, when she was told to leave Martel homes, that she moved in with me.

According to Ms. Bledsoe's affidavit, someone called CI1 told her he "often bought drugs" from me. CI1 is a damnable liar.

Neither CI1 nor anyone else has ever purchased drugs from me.

According to Regina Bledsoe's affidavit my brother, Frank Middlebrooks now lives in Dayton, Ohio. False. Frank has never lived anywhere the past 30 years but in Detroit, Michigan.

According to Ms. Hunt, my brother Frank Middlebrooks lives in Cleveland, Ohio. Apparently she and Ms. Bledsoe can't agree where my bother lives In any case they're both wrong.

According to Ms. Hunt's brief, CI1 was told that my son had ordered the Cadillac from Detroit and that he "was flying to Detroit to pick up the car." That is false in its entirety.

According to Ms. Hunt CI1 and CI2 said that my son has driven my car "to and from Jordan's residence" on drug-related business. CI1 and CI2 are both liars and their statement is false in its entirety.

So what it all comes down to are the same questions I asked before:

Why did they bust in my door at 6:00 in the morning?

Why did they ransack my home and tear it apart?

Why did they feel it necessary to knock me up against the wall?

Why did they cart off all of my private papers including *family* photographs?

Why did they steal my meager possessions?

Why did they take my jewelry and my car—without a warrant, without probable cause, without any evidence that I have ever in my life engaged in any drug related activity?

What kind of country is this becoming?

FURTHER AFFIANT SAYETH NOT.

/s/ _____
Affiant

Sworn to and subscribed
before me this 17th day
of September, 1989.

/s/ _____
Notary Public

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:90-CV-1034-HTW

UNITED STATES OF AMERICA,
Plaintiff,

v.

ONE 1987 CADILLAC, VIN NO. 1G6CD5185H4237660,
Defendant.

COMPLAINT FOR FORFEITURE

[Filed May 11, 1990]

The United States of America, plaintiff in this matter, shows the Court the following in support of this Complaint for Forfeiture:

1.

This Court has jurisdiction over the claim by virtue of Title 28, United States Code, Sections 1345 and 1355.

2.

On or about July 27, 1989, agents of the Drug Enforcement Administration (DEA), United States Department of Justice, seized the defendant property, one 1987 Cadillac Vin No. 1G6CD5185H4237660, on land within the jurisdiction of this Court.

3.

Based on the totality of circumstances surrounding the seizure of the defendant vehicle, DEA agents have probable cause to believe the defendant vehicle was used to

facilitate the sale, receipt, or possession an illegal controlled substance in violation of Title 21, United States Code, Section 881(a)(4) and is proceeds traceable to an exchange of a controlled substance in violation of Title 21, United States Code, Section 881(a)(6), as is more fully described below.

4.

Mrs. Charlie Bowens is the titled and registered owner of the defendant vehicle. Mrs. Bowens is the mother of Ernest Swain and Jacquelyn Swain Morgan (Morgan), both of whom were convicted in October 1989 of drug-trafficking in the Superior Court of Fulton County, Georgia. Swain pled guilty to charges against him in two indictments and was sentenced to serve ten years in one indictment, to run concurrent with two ten year sentences in the second indictment, for violations of the Georgia Controlled Substances Act, including one count of trafficking in cocaine. Morgan pled guilty to one count of violating Georgia's Controlled Substances Act and received a five year sentence to serve one year with the rest of the sentence suspended. Agents of the United States have probable cause to believe that Ernest Swain is the real owner of the defendant vehicle.

5.

Ernest Swain has been arrested many times before his recent drug-trafficking arrest, during a search of a residence at 2004 Echota Way, Riverdale, Georgia, on July 26, 1989, and has been convicted on the following occasions: for attempted murder, 1969, for armed robbery, 1975; and for murder, 1978. Jacqueline Swain Morgan has also been arrested on various charges: in 1988, for possession with intent to distribute cocaine and marijuana, for possession of other dangerous drugs, and for possession of a sawed off shotgun; 1989, for possession with intent to distribute marijuana; and, most recently

in 1989, after the July 26, 1989 search, for possession with intent to distribute cocaine.

6.

According to a reliable confidential informant (CI1), whose information has been corroborated in the past and upon whose information earlier cases have been made, Ernest Swain had a job from which he made a good living until 1975, when he either lost the job or quit it. Swain began dealing marijuana at that time. In 1983, according to CI1, he started dealing cocaine. Between 1975 and the present until June or July 1989, when Swain was not incarcerated, CI1 reported Swain had no visible gainful employment. Mrs. Bowens and Jimmy Lee Herring, who is her companion and shares her home, have no income other than monthly checks from social security.

7.

According to CI 1, at one time, around 1983-1985, Swain, Morgan, Charlie Bowens, and Jimmy Herring all lived together at Washington Circle Apartments in East Point, Georgia. CI1 told DEA agents that during this time he bought drugs from Swain, Morgan, and Bowens. CI1 reported that, also during this same period, both Swain and Morgan told him/her that Swain had ordered a very nice customized Cadillac from Detroit and, at a later time, Swain told CI1 that he (Swain) was flying to Detroit to pick up the car.

8.

On November 17, 1986, the defendant vehicle was sold by Don Gooley Cadillac, Inc. in Harper Woods, Michigan, to Frank Middlebrooks for $28,828.56 for cash [various bills of small denominations ($5's, $10's, $20's)]. Middlebrooks was accompanied by another male when he came to the dealership on November 14, 1986 to select the defendant vehicle. Middlebrooks left a $100 deposit on the

vehicle selected and asked that a sunroof be installed in it. When Middlebrooks returned for the vehicle, he was accompanied by two other men, one of whom brought the cash with which the defendant vehicle was purchased. Middlebrooks is the brother of Charlie Bowens and Swain's uncle. The Michigan title was cancelled when Frank Middlebrooks transferred the defendant vehicle to Charlie Bowens and a Georgia title was issued. The defendant vehicle was registered in Georgia to Charlie Bowens at the Washington Circle Apartments address in February 1987.

9.

The search at 2004 Echota Way, Riverdale, Georgia, where Swain, Bowens, and Morgan were apparently all living at the time of the search and the seizure of the defendant vehicle resulted from an investigation of the drug-trafficking activities of Morgan and Swain. Hand to hand undercover cocaine buys were made by an East Point undercover agent for several months prior to the search and the seizure of the defendant vehicle. Several buys had been made from an individual named Eddie Lewis Jordan, whom CI1 had reported as being Swain's main drug runner. The 1988 Toyota Corolla driven by Jordan was registered to Charlie Bowens' address, where both Bowens and Swain were residing at this time. CI1 and another reliable informant (CI2), whose information has been corroborated in the past and upon whose information earlier cases have been made, both reported to agents that Swain drove the 1986 Cadillac registered to his mother to and from Jordan's residence to pick up and deliver money to Jordan.

10.

Charlie Bowens told DEA Special Agent Regina Bledsoe at the time of the search that the defendant vehicle belongs to her (Bowens) and that the vehicle was purchased for her by her brother Frank Middlebrooks. On

that same evening, however, Bowens' daughter Jacqueline Morgan told Task Force Agent J. T. Brayboy that her brother (Swain) had purchased the car for his mother. Frank Middlebrooks is a disabled individual, who until 1986 worked for Ford Motor Corporation. Middlebrooks has told Special Agent Bledsoe that he purchased the defendant vehicle for his sister Charlie Bowens, although Middlebrooks admitted Bowens could not drive it when Middlebrooks delivered it to her in Georgia. Although he has a wife and two grown children and although he stated to Special Agent Bledsoe that he drives a Ford Tempo, early '80's model, Middlebrooks told Special Agent Bledsoe that he bought the car for his sister, who could not drive it, because she provided him with money when he was in the Army, and he had always wanted to do something nice for her. The money for the purchase of the defendant vehicle allegedly came from a cash horde of earnings, savings, and awards from lawsuits which Frank Middelbrooks filed over the years against various companies. Middlebrooks stated to Special Agent Bledsoe that he did not keep his savings in any bank, credit union, savings and loan company, or any other institution so he had no records of those savings to show Agent Bledsoe.

11.

At the time Special Agent Bledsoe last saw Charlie Bowens in July 1989, Charlie Bowens, had cataracts and was unable to see well enough to avoid walking into a wall, much less drive a vehicle.

12.

The defendant vehicle is subject to forfeiture because it was used to facilitate the sale, receipt, or possession an illegal controlled substance in violation of 21 U.S.C. § 881(a)(4), and the defendant vehicle is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6) as it is pro-

ceeds traceable to a sale or an exchange of an illegal controlled substance.

13.

WHEREFORE, the United States prays:

(1) That due process issue for arrest of the defendant vehicle;

(2) That all persons having any interest in the defendant vehicle appear and show cause why the forfeiture should not be decreed;

(3) That an order issue forfeiting the defendant vehicle to the United States;

(4) That plaintiff be awarded the costs of this action; and

(5) That the Court award such other and further relief as it deems just and proper.

Respectfully submitted,

RIMANTAS A. RUKSTELE
United States Attorney

/s/ Nina L. Hunt
NINA L. HUNT
Assistant United States Attorney

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. ——

UNITED STATES OF AMERICA,
Plaintiff,

v.

ONE 1987 CADILLAC,
VIN No. 1G6CD5185H4237660,
Defendant.

VERIFICATION

I, Regina Bledsoe, Special Agent, Drug Enforcement Administration, United States Department of Justice, have read the foregoing Complaint for Forfeiture and state that the contents are true to the best of my knowledge, information and belief.

This 11th day of May, 1990.

/s/ Regina Bledsoe
REGINA BLEDSOE
Special Agent
Drug Enforcement Administration

Sworn to and subscribed before
me, this 11th day of May, 1989.

/s/ Illegible
Notary Public
My commission expires
July 12, 1991

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:90-CV-1034-HTW

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ONE 1987 CADILLAC,
VIN NO. 1G6CD5185H4237660,
Defendant.

ANSWER

The claimant Charlie Mae Bowens files this her answer to the complaint for forfeiture:

(1)

Allegation number 1 is a statement of law and as such requires no answer.

(2)

Claimant admits that on or about July 27, 1989 Regina Bledsoe and others unlawfully seized claimant's Cadillac.

(3)

Claimant denies allegation number 3.

(4)

Claimant admits that Charlie Mae Bowens is the titled and registered owner of the defendant vehicle. Claimant

denies each and every other allegation of allegation number 4.

(5)

Allegation number 5 is impertinent and is therefore denied.

(6)

Allegation number 6 is impertinent and is therefore denied.

(7)

Allegation number 7 is impertinent and is therefore denied.

(8)

Claimant admits that Frank Middlebrooks is Charlie Mae Bowens's brother, admits that the defendant vehicle was registered to Charlie Mae Bowens. Claimant denies each and every other part of said allegation number 8.

(9)

Claimant denies each and every part of allegation number 9.

(10)

Claimant admits that Charlie Mae Bowens told Regina Bledsoe that the defendant vehicle belonged to her and that it was purchased for her by her brother, Frank Middlebrooks. Claimant denies each and every other part of allegation number 10.

(11)

Claimant is unable to affirm or deny what Regina Bledsoe said she saw.

(12)

Claimant denies allegation number 12.

WHEREFORE the claimant prays that:

1. The complaint be dismissed;

2. The claimant be awarded the cost of this action together with attorney's fees;

3. The claimant have such other and further relief as is just and proper in the premises.

Respectfully submitted,

/s/

HERBERT SHAFER
Georgia Bar No. 637200
Attorney for Defendant

432 Delmont Drive N.E.
Atlanta, Georgia 30305
(404) 266-8827

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:90-cv-1034-HTW

UNITED STATES OF AMERICA,
Plaintiff,

v.

ONE 1987 CADILLAC,
VIN NO. 1G6CD5185H4237660,
Defendant.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1.

On July 27, 1989, agents of the Drug Enforcement Administration ["DEA"], United States Department of Justice, seized the defendant 1987 Cadillac.[1] The defendant Cadillac was seized during the execution of a state search warrant at 2004 Echota Way, Riverdale, Georgia, the residence of Charlie Bowens. The search warrant

---

[1] These facts are from the verified complaint and from the depositions of Ernest Swain and Frank Middlebrooks. This summary judgment motion is also supported by the affidavit of Charlie Mae Bowens filed on or about September 20, 1989, attached to the "Response to Regina Bledsoe's Motion to Stay Discovery" in related Action No. 1:89-cv-1776-HTW and by the affidavit of Regina Bledsoe filed on September 15, 1989, attached to the "Motion to Stay Discovery, or, Alternately, Motion to Quash Subpoenas" in related Action No. 1:89-cv-1776-HTW. The Court is requested to take judicial notice of the affidavits under Rule 201, Federal Rules of Evidence. The copy of Middlebrooks' deposition is being filed with this motion. The original will be filed as soon as the undersigned Assistant can obtain it from the court reporter in Michigan.

was executed incident to the investigation of her son Ernest Swain for drug-related criminal violations.

2.

Mrs. Charlie Bowens is the titled and registered owner of defendant Cadillac. Ms. Bowens has cataracts and is unable to see well enough to drive a car. She was unable to see well enough to drive a car at the time the defendant Cadillac was purchased.[2] Ms. Bowens is the mother of both Ernest Swain and Jacquelyn Swain Morgan, both of whom, in October 1989, pled guilty to violations of Georgia's Controlled Substances Act. Swain was sentenced to serve ten years in one drug-related indictment to serve this time concurrently with two ten year sentences in a second indictment. Morgan pled guilty to one count of violating Georgia's Controlled Substances Act, and received a five year sentence to serve one year with the rest of the sentence suspended.

3.

On November 17, 1986, the defendant Cadillac was purchased by Frank Middlebrooks, Ms. Bowens' brother, from Don Gooley Cadillac, Inc. in Harper Woods, Michigan, for $28,828.56 for cash [various bills of small denominations $5's, $10's, $20's]. Ms. Bowens told DEA Agent Regina Bledsoe that the defendant Cadillac was purchased for her by her brother Frank Middlebrooks. When Agent Bledsoe visited Frank Middlebrooks in Detroit, Michigan, where Frank Middlebrooks resides, Mr. Middlebrooks told Agent Bledsoe that he purchased the car for his sister because she had provided him with money when he was in the Army and that he had always wanted to do something nice for her. Furthermore, Mr.

---

[2] Q. "At the time that the car was purchased your mother could not see well enough to get a Georgia driver's license, could she? A. "I don't think she could see well enough to drive, but she already had a license . . ." Deposition of Ernest Swain, p. 10.

Middlebrooks told Agent Bledsoe that he had accumulated the money to purchase the defendant Cadillac from a cash horde of savings and from awards from lawsuits which he had filed over the years against various companies. Mr. Middlebrooks admitted to Agent Bledsoe that he had no records to support his statement about the source of funds for the purchase.

4.

At his deposition on August 8, 1990, in Detroit, Michigan, Frank Middlebrooks admitted that his statement to Agent Bledsoe about the identity and the source of funds for the purchase of the defendant Cadillac was untrue. Frank Middlebrooks testified that he received a long distance call from his nephew Ernest Swain who told Mr. Middlebrooks that he [Swain] had saved up enough money to buy his mother Charlie Bowens a Cadillac and asked that Mr. Middlebrooks help him make the purchase. [pp. 12-13]. Ernest Swain drove up from Atlanta with cash in a little small case to purchase the car. [pp. 13, 16-17]. Mr. Middlebrooks testified that he never touched the money and did not even see it until Ernest Swain pushed the money toward him and Mr. Middlebrooks pushed it toward the car dealer, who counted the money out for the purchase of the defendant Cadillac. [pp. 16-18]. Thus, Mr. Middlebrooks abandoned his claim that he supplied money to purchase the defendant Cadillac and admitted that, instead, not only did it come directly from Ernest Swain, but also that he could not have afforded to purchase the car for his sister anyway. [pp 25-26].

5.

At Ernest Swain's deposition taken at a Georgia state prison on December 27, 1990, Swain admitted that his mother never drove the defendant Cadillac. Swain admitted that he and his sister Jacquelyn Swain Morgan

drove the car.[3] Swain claimed that he, his sister Jacquelyn Swain Morgan, and another uncle, not Frank Middlebrooks, bought the defendant Cadillac. "Jackie came up with some money, I came up with some money and we called my uncle in Detroit and he came up with 3 or $4,000.00 and we all bought the car together. I mean, I had to think about $6,000 I put in the car. . . . Well, I got about 25 hundred dollars of it from my wife and the rest of the money I got from the restaurant that we [Swain and his sister Jacquelyn] was running at the time."[4] Swain flatly denied taking $27,000 of his money to Detroit to purchase the defendant Cadillac and stated, instead, that he took only $23,000 in cash from various sources to Detroit, explaining that, when he came up about $24,000 short of money to purchase the car, Frank Middlebrooks made up the difference.[5] Ernest Swain has no records from which one may trace the purchase of the defendant Cadillac to any given financial transaction.

Respectfully submitted,

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---

[3] "But she never drove it. We didn't get it for her to drive. I drove it, my sister drove it, and my wife drove it. Whenever she needed to go somewhere. But mostly my sister and I drove it sometimes. She [Ms. Bowens] can't drive, no. She couldn't see good enough to drive a car." Ernest Swain deposition, p. 10.

[4] Ernest Swain deposition, p. 8.

[5] Ernest Swain deposition, p. 18.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:90-cv-1034-HTW

UNITED STATES OF AMERICA,
Plaintiff,

v.

ONE 1987 CADILLAC, VIN NO. 1G6CD5185H4237660,
Defendant.

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

It is Plaintiff's contention that the defendant Cadillac was purchased by Ernest Swain with drug proceeds. The United States also contends that Ernest Swain is the true owner of the defendant Cadillac, not Charlie Mae Bowens, the only claimant in this action.[1] The United States has set forth in the Statement of Undisputed Material Facts filed with this brief a detailed description of the facts and circumstances surrounding the purchase of the defendant Cadillac. Those facts abundantly demonstrate that agents of the United States have probable cause to believe that the defendant Cadillac was purchased with drug proceeds and that Charlie Mae Bowens is the "owner" of the defendant Cadillac in name only.

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[1] Although Ernest Swain was served in this action, he has not responded. The Clerk has been requested to enter default against him, but has not yet done so to date of this filing.

A. Probable Cause Exists for the Forfeiture of the defendant Cadillac.

There are two burdens of proof in a civil forfeiture action based upon 21 U.S.C. § 881. The United States must meet its burden to show probable cause to believe a substantial connection exists between the property and drug dealing, then the burden of proof shifts to the claimant to show there is no connection. *United States v. A Single Familly Residence*, 933 F.2d 976, 929 (11th Cir. 1991); *United States v. A Single Family Residence*, 803 F.2d 625, 628-629 (11th Cir. 1986); *United States v. $41,305*, 802 F.2d 1339, 1343-1344 (11th Cir. 1986); *United States v. Four Million, Two Hundred Fifty-Five Thousand Dollars*, 762 F.2d 895, 902-904 (11th Cir. 1985), *cert. denied* 474 U.S. 1056 (1985); *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424, 1426-1427 (11th Cir. 1983).

Probable cause is a reasonable ground for belief of guilt, less than prima facie, more than mere suspicion—which is judged not with clinical detachment but with a common sense view to the realities of normal life. *United States v. A Single Family Residence*, 803 F.2d 625, 628 (11th Cir. 1986). Probable cause can be based wholly on circumstantial evidence and the inferences to be drawn from that evidence, which may include facts learned after the seizure. *$41,305, supra*, 802 F.2d at 1343, citing *Four Million, Two Hundred Fifty-Five Thousand Dollars, supra*. The United States is required only to show there are reasonable grounds to believe a substantial connection exists between the property and drug trafficking; it is not required to offer evidence of specific drug transactions involving the properties. *United States v. $41,305, supra*, 802 F.2d at 1343. See also *Single Family Residence, supra*, 803 F.2d at 629 n.3.

In demonstrating probable cause, the United States is permitted to use hearsay evidence. *Single Family Residence supra*, 803 F.2d at 629; n.2; *United States v. 1964*

Beechcraft Baron Aircraft, 691 F.2d 725, 728 (5th Cir. 1982). *See also United States v. Misc. Jewelry*, 667 F. Supp. 232, 238 (D.Md. 1987) citing *Single Family Residence, supra*, and *United States v. One 56-Foot Yacht*, 702 F.2d 1276 (9th Cir. 1983); *United States v. Nixon*, 629 F. Supp. 857, 858 (N.D. Ala. 1986) citing *Bush v. United States*, 389 F.2d 485 (5th Cir. 1968); *United States v. 1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1434 (9th Cir. 1985).

In demonstrating that properties are proceeds of illegal narcotics trafficking under 21 U.S.C. § 881(a)(6), there is no need for the United States to trace the property charged to specific transactions involving illicit drugs, or to prove by a preponderance of the evidence that a substantial connection exists between that property and drug-dealing; the United States need only furnish reasonable grounds to believe such a connection exists. *$41,305, supra*, 802 F.2d at 1343. In this regard, the United States has shown that Ernest Swain was involved in drug-trafficking in the time period relevant to the purchase of the defendant Cadillac. There will be no evidence produced by the claimant to suggest that Swain was earning any substantial amount of legitimate income during the time period in question. In addition, the United States has shown the first explanation produced by the claimant to explain a legitimate source for the purchase of the defendant Cadillac is a total fabrication. Finally, the circumstances surrounding the purchase of the Cadillac with cash produced from a small case at the dealership are highly suspicious.

The probable cause is overwhelming in this action. The United States has no difficulty meeting its burden.

B. The claimant will not be able to meet her burden to demonstrate the defendant Cadillac's "innocence."

Once the United States demonstrates probable cause to believe that a substantial connection exists between the

defendant property and illegal narcotics, the burden shifts to the claimant to show by a preponderance of credible evidence that there is a defense to the forfeiture action. *United States v. One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884 (11th Cir. 1989). "This burden is met either by rebutting the government's evidence that the property was purchased with proceeds of illegal drug activities or a showing that the claimant is an "innocent owner" who did not know of the property's connection with drug sales. *A Single Family Residence, supra*, 933 F.2d at 979.

Failure to rebut a showing of probable cause to believe that the property was substantially connected to facilitation of an exchange for an illegal controlled substance or proceeds of that exchange is sufficient by itself to warrant forfeiture. *See United States v. $5,644,540.00 In United States Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986); *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983). In a "proceeds" case proof of the existence of an innocent alternative source for the funds seized is not enough to carry the claimant's burden that the funds are not "proceeds." *$41,305, supra*, 802 F.2d at 1344-1345. *See also United States v. 228 Acres*, 916 F.2d 808, 813 (2nd Cir. 1990); *United States v. $215,300*, 882 F.2d 417, 420 (9th Cir. 1989); *United States v. $5,743*, 739 F. Supp. 1354, 1357 (E.D.Mo. 1990).

In this action, the claimant will be unable to demonstrate that the defendant is not substantially connected to illegal drug activity. Since claimant Bowens will not be able to make a showing sufficient to establish the existence of every element essential to her case and on which she bears the burden of proof at trial, Rule 56, Federal Rules of Civil Procedure, mandates the entry of summary judgment against her claim and in favor of the United States. *Brown v. City of Clewiston*, 848 F.2d 1534, 1537 (11th Cir. 1988).

The assertion of bare legal title held by claimant Bowens alone is not sufficient to establish Article III standing to

contest the forfeiture of the property in this action. *United States v. Lot 111-B*, 902 F.2d 1443, 1444 (9th Cir. 1990); *United States v. 526 Liscum Drive*, 866 F.2d 213, 217 (6th Cir. 1988); *United States v. Single Family Residence, supra*, 803 F.2d at 630; *United States v. One 1978 Piper Navajo PA-31 Aircraft, supra*, 748 F.2d at 319; *United States v. One 1945 Douglas C-54 Aircraft*, 604 F.2d 27, 28 (8th Cir. 1979) *cert. denied, Stumpff v. United States*, 454 U.S. 1143 (1982). The rationale reflects a candid determination that things are often not what they appear to be, especially in the world of drug-trafficking. Persons engaged in drug-trafficking often attempt to disguise their interests in property by placing title in another's name. *United States v. Single Family Residence*, supra, 803 F.2d at 630. Placing ownership of illegally used or obtained property in someone else's name is a common tactic used by drug-traffickers. The "straw man" strategy "helps mask the actual ownership . . . [and] makes it easier for the nominal owner to assert the 'innocent owner' defense." *United States v. One 1977 36 Foot Cigarette Ocean Racer*, 624 F. Supp. 290, 292-293 (S.D.Fla. 1985).

The explanation of how claimant Bowens obtained the defendant Cadillac from her brother Frank Middlebrooks has been completely discredited, not only because Frank Middlebrooks repudiated his own earlier statements in his deposition, but also because his testimony is completely at odds with that of Ernest Swain. Claimant Bowens can not and never has even been able to drive the defendant Cadillac. There is no way that claimant Bowens can carry her burden of showing that she is an "innocent owner" in this action.

CONCLUSION

The United States has made the requisite showing to prevail in this action, and claimant Bowens will be unable to defend against that showing. Summary judg-

ment should be expeditiously entered in favor of the United States as to the defendant Cadillac.

Respectfully submitted,

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 1:90-cv-1034-HTW

UNITED STATES OF AMERICA,
Plaintiff

VS.

ONE 1987 CADILLAC,
VIN NO. 1G6CD5185H4237660,
Defendant

ORDER OF COURT

[Filed Feb. 14, 1992]

This matter is currently before this court on the plaintiff's motion for summary judgment.

FACTS

Agents of the Drug Enforcement Administration, (hereinafter "DEA"), seized the defendant 1987 Cadillac in July, 1989, during the execution of a state search warrant on the residence of Mrs. Charlie Mae Bowens, on Echota Way in Riverdale, Georgia. The agents executed the warrant as part of an investigation of certain drug-related activities of Mrs. Bowens' son, Ernest Swain.

Mrs. Bowens is the titled and registered owner of defendant Cadillac; she is also the mother of Ernest Swain and Jacquelyn Swain Morgan, both of whom, in October, 1989, pled guilty to violations of Georgia's Controlled Substances Act.

Mrs. Bowens explained to DEA agents that her brother, Frank Middlebrooks, purchased the defendant Cadillac in November, 1986, in Harper Woods, Michigan. Middlebrook paid $28,828.56 in cash for the Cadillac, using small bills in denominations of $5's, $10's, and $20's. Middlebrooks subsequently stated to a DEA agent that he had purchased the car for his sister because she had provided him with money while he was in the Army, and he had consequently always wanted to do something nice for her. Middlebrooks also stated that he had accumulated the funds necessary to purchase the Cadillac from a cash horde of savings and from awards from lawsuits which he had filed over the years against various companies.

At a subsequent deposition in Detroit, however, Middlebrooks acknowledged that his previous statement, (regarding the identity and source of funds for the purchase of the Cadillac), was untrue. Middlebrooks then testified that he had received a long distance telephone call from his nephew, Ernest Swain; Swain told Middlebrooks that he (Swain) had saved enough money to buy his mother a Cadillac, and asked Middlebrooks to help him make the purchase. Swain then drove to Michigan from Atlanta, with cash in a small case, to purchase the car.

Middlebrooks then testified that he never even touched the money that Swain delivered. He stated, in fact, that he did not see it until Swain pushed the money toward him; Middlebrooks then pushed it toward the car dealer, who removed the money necessary for the purchase of the car.

At his deposition in December, 1990, Swain stated that his mother never drove the defendant Cadillac; he then explained that he and his sister, Jacquelyn Swain Morgan, and an additional uncle, were the only individuals to drive the car. Swain also stated that he, his wife, sister and uncle had combined funds in order to provide the cash for the Cadillac. Swain has no records, however, which

would enable agents to trace the purchase of the Cadillac to any particular source.

DISCUSSION

Plaintiff now contends that the evidence in this matter clearly shows that Ernest Swain purchased the defendant Cadillac with drug proceeds; plaintiff also contends that Swain, rather than Mrs. Bowens (the only claimant in this action), is the true owner of the car. This court agrees with both of plaintiff's contentions.

A. *Probable Cause for the Forfeiture*:

Under 21 U.S.C.A. § 881, plaintiff first must show probable cause to believe that a substantial connection exists between the defendant property and drug dealing; the burden then shifts to the defendant property to show that no such connection exists. *See, e.g., United States v. A Single Family Residence*, 933 F.2d 976, 979 (11th Cir. 1991). The Eleventh Circuit has characterized probable cause as a reasonable ground for belief of guilt which is less than *prima facie* but more than mere suspicion, and which this court must evaluate, "not with clinical detachment, but with a common sense view toward the realities of normal life." *United States v. A Single Family Residence*, 803 F.2d 625, 628 (11th Cir. 1986). [Citation omitted].

Wholly circumstantial evidence, (together with inferences drawn from that evidence, including information learned *after* the seizure), may establish probable cause. *United States v. $41,305*, 802 F.2d 1339, 1343 (11th Cir. 1986). [Citation omitted]. Plaintiff need not show evidence of specific drug transactions involving the property in question; plaintiff must show only that a substantial connection exists between the defendant property and drug trafficking. *$41,305, supra*, 802 F.2d at 1343.

In this case, plaintiff has already shown that Ernest Swain was involved in drug trafficking during the period

in question. Plaintiff has also shown that claimant's first explanation for the source of the cash—that it derived solely from Swain's uncle, Frank Middlebrooks—was untrue. Finally, plaintiff has shown that the purchase of the Cadillac—with cash, in small bills, taken from a case—was suspicious. Thus, in this court's view, plaintiff has made sufficient showing that probable cause existed for the government's forfeiture of the defendant Cadillac.

B. *Claimant's Burden of Proof*:

Claimant may meet her burden of proof in this matter either "by rebutting the government's evidence that the property was purchased with proceeds of illegal drug activities, or a showing that the claimant is an 'innocent owner' who did not know of the property's connection with drug sales." *One Single Family Residence*, 933 F.2d at 979. [Citation omitted]. In claimant's Response, claimant has shown this court no evidence which suggests that Swain was earning any substantial amount of legitimate income during the time period in question.[1]

This court must also note that the government's brief appears to evince some confusion between two differing legal standards, specifically, the notion of "innocent ownership" codified in 21 U.S.C.A. § 881(a)(7), and a notion of "actual ownership," defined only by reference to case law within this Circuit. In *United States v. Sixty Acres in Etowah County*, 930 F.2d 857, 859 (11th Cir. 1991), the Eleventh Circuit embellished the law of "innocent ownership," and noted that Section 881(a)(7) exempts property from forfeiture whose owners can establish that the "[illegal] act or omission . . . [was] committed or omitted without the knowledge or consent of that owner."

In claimant's response, claimant makes no attempt to establish an "innocent owner" defense within the meaning

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[1] Although Swain was not convicted of drug trafficking until 1989, he stated in his deposition that he began dealing drugs in 1984.

of 21 U.S.C.A. § 881(a)(7). Claimant's response does state, however, that claimant is the "titled and registered owner of the Cadillac." Thus claimant appears to assert that she is the actual, rather than innocent, owner of the vehicle. Claimant's assertion, however, even if true, does not suffice to establish that claimant was the true owner of the vehicle. As one court has already concluded, actual ownership, at least in some circumstances, requires more than mere legal title:

> The possession of bare legal title may be insufficient to establish ownership. [citation omitted]. The rationale for the rule that bare legal title may be insufficient is based on a candid determination that things are often not what they appear to be, especially in the world of drug trafficking. . . . In brief, people engaged in illegal activities often attempt to disguise their interests in property by placing title in someone else's name.

United States v. One 1977 36 Foot Cigarette Ocean Racer, 624 F.Supp. 290, 295 (S.D.Fla. 1985).

In this case, both Middlebrooks and Swain have conceded that at least some of the funds for the Cadillac originated with Swain.[2] In Swain's deposition, in fact, he stated that his mother never even drove the defendant property. Although Mrs. Bowens denies that her son used drug proceeds to purchase the car, she has shown the court no evidence that the funds were legitimate. In this court's view, therefore, plaintiff has made a sufficient showing that Swain used drug proceeds to purchase the car, and then placed its title in his mother's name in an effort to conceal its origin. This court therefore concludes that claimant has failed to rebut the plaintiff's showing of probable cause.

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[2] According to Middlebrooks, *all* the funds originated with Swain.

CONCLUSION

This court accordingly GANTS (sic) plaintiff's motion for summary judgment.

SO ORDERED, this 13th day of February, 1992.

/s/ Horace T. Ward
HORACE T. WARD
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:90-CV-1034-HTW

UNITED STATES OF AMERICA,
Plaintiff,

VS.

ONE 1987 CADILLAC,
VIN No. 1G6CD5185H4237660,
Defendant,

CHARLIE MAE BOWENS,
Claimant.

NOTICE OF APPEAL

Notice is hereby given that Charlie Mae Bowens, Claimant above-named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Judgment entered herein on February 18, 1992 granting Plaintiff's motion for summary judgment.

Respectfully submitted,

/s/ Herbert Shafer
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APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:90-CV-1034-HTW

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ONE 1987 CADILLAC,
VIN NO. 1G6CD5185H4237660,
Defendant,

CHARLIE MAE BOWENS,
Claimant.

MOTION TO STAY JUDGMENT OF THE COURT AND ENFORCEMENT PENDING APPEAL

Charlie Mae Bowens respectfully moves the Court to stay execution of the judgment entered on 18 February 1992 pending appeal.

In support of this motion she shows to the Court.

This is an *in rem* proceeding. Unless a stay is granted the government will dispose of the *res*. If that should happen, the *res* would be removed from the appellate court's jurisdiction and the appellate court would thereby lose *in rem* jurisdiction. *United States of America v. One Single Family Residence*, 932 F. 2d 1433 (11th Cir. 1991); *L. B. Harvey Marine, Inc. v. M/V River Arc*, 712 F. 2d 458 (11th Cir. 1983); *Taylor v. Tracor Marine, Inc.*, 653 F. 2d 1361 (11th Cir. 1982, *cert. denied*, 460 U.S.

1012, 103 S. Ct. 1252, 75 L. Ed. 481 (1983). The rule has recently been reiterated in *United States v. One 1983 Homemade Vessel Named Barracuda*, 858 F. 2d 643, 647 (11th Cir. 1988).

See also *United States v. $57,480.05 Currency and Other Coins*, 722 F. 2d 1457, 1458-59 (9th Cir. 1984):

"Release or removal of the *res* from the control of the court end[s] jurisdiction of the court, in accordance with the general rule. . . .

"The destruction of the district court's jurisdiction puts an end to ours as well. Were we to reverse the judgment of the district court, there would be no *res* upon which our mandate could operate (citations omitted)".

Accordingly, to preserve the Circuit Court's jurisdiction, it is respectfully moved that the Court stay execution of the judgment and thereby preserve the *res*.

Respectfully submitted,

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APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:90-cv-1034-HTW

UNITED STATES OF AMERICA,
Plaintiff,

v.

ONE 1987 CADILLAC, VIN NO. 1G6CD5185H4237660,
Defendant.

PLAINTIFF'S RESPONSE TO CLAIMANT BOWENS'S MOTION FOR STAY PENDING APPEAL

The plaintiff does not oppose the request for a stay made by Claimant Bowens so long as she follows the requirements of Rule 62(d), Federal Rules of Civil Procedure.

However, Claimant Bowens is not presently entitled to a stay of judgment in this case because (1) she has failed to meet the prerequisites for obtaining a stay and (2) she has failed to post a supersedeas bond in accordance with Rule 62(d), Federal Rules Civil Procedure.

I.

Claimant Bowens is not entitled to a Stay

When an appellant makes an application for a stay pursuant to Rule 62(d), the Court must make the following inquiry: (1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured

absent a stay; (3) whether issuance of the stay will substantially injure the party opposing the stay; and (4) whether granting a stay lies within the public's interest. *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). *See also Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed. 2d 724 (1987) (applying the civil stay prerequisites to a habeas appeal).

A.

Claimant is Unlikely to Prevail on Appeal

"Ordinarily the first factor is the most important." *Garcia-Mir, supra*, 781 F.2d at 1453. A finding that the movant demonstrates a probable likelihood of success on the merits requires a determination that the district court's decision was clearly erroneous. *Id.* Claimant's motion for stay, however fails to cite any facts or law which demonstrate that this Court's decision granting plaintiff's summary judgment motion was clearly erroneous. Moreover, for reasons already discussed in plaintiff's summary judgment motion and this Court's Order granting same, it is extremely unlikely that claimant will prevail on appeal.

B.

The res may be sold pending appeal so there is a risk that Claimant Bowens will be injured absent a stay as the appellate court may well be divested of jurisdiction to hear the appeal, but Plaintiff will also be injured if a Stay is granted.

It is now well settled that an appellate court may be divested of jurisdiction over the *res* in a civil forfeiture action if the *res* is removed from the jurisdiction of the court, by sale or otherwise, while the action is on appeal. *United States v. Certain Real & Personal Property*, 943 F.2d 1292 (11th Cir. 1991). A claimant who seeks to stay the district court's decision in a forfeiture action pending appeal must petition the district court for permission to post a supersedeas bond, the bond requirement

being subject to waiver if the claimant demonstrates indigency. 943 F.2d at 1296. Plaintiff has not done this here; she has shown merely that, unless a stay is granted, the United States will dispose of the *res* in this action. This is self-evident, and it is no more than the United States is permitted to do unless the district court grants the claimant's application. *Id.*

Plaintiff will also be harmed if the claimant's succeeds in further delaying disposition of the defendant by obtaining a stay here. The defendant automobile was seized July 27, 1989. The Court may judicially note, under Rule 201, Federal Rules of Evidence, that its value decreases as it becomes older and is stored without being driven. The Order and Judgment appealed from here was entered on February 18, 1992. This date is nearly three years past the date the defendant vehicle was seized.

The legislative history of 21 U.S.C. § 881 makes it clear that the forfeiture provisions of Title 21 U.S.C. have a strong remedial aim of dismantling the wealth connected with drug trafficking. As Congress explained.

> More that ten years ago, the Congress recognized in its enactment of statutes specifically addressing organized crime and illegal drugs that the conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations enterprises were left intact, and so included forfeiture authority designed to strip these offenders and organizations of their economic power . . . . Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack is made.

S. Rep. no. 225, 98th Cong., 2d Sess. 191, *reprinted in* 1984 U.S. Code Cong. & Adm. News 3182, 3374.

Further delay diminishes the value of the defendant and injures the United States, which converts the assets of drug dealers to use in law enforcement. Thus, the public interest is disserved by granting a stay, as well.

II.

Claimant's Failure to Post a Supersedeas Bond Disqualifies Bowens from obtaining a Stay

Fed. R. Civ. P. 62(d) also provides that

> [w]hen an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay . . . The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Generally district courts set supersedeas bonds in "the whole amount of the judgment remaining unsatisfied," plus interest, costs on appeal and damages for delay, "unless after notice and hearing and for good cause the court fixes a different amount or orders security other than the bond." *Poplar Grove Etc. v. Bache Halsey Stuart Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979).

The defendant property has an estimated value of $8,500.00 and costs the United States Marshals Service approximately $3.00 per day for storage. [See AUSA Nina L. Hunt's declaration, which is attached to the response.] The actual storage fees to date are $3,603.00. It is expected that it will cost the government $875.00 to defend this appeal (10) hours of legal work at the EAJA rate of $75.00 per hour plus $125.00 for the cost of typing, copying and assembling briefs).

The appearance form in this action has just been transmitted to counsel. No briefing schedule has been set. The appeal may be pending during all of 1992. Because the appeal may be pending throughout 1992, the Marshal will likely incur approximately $810.00 in storage fees ($90 x

9 months) for storage expenses for the rest of 1992. Thus, the United States has at stake a car valued at $8,500.00, which has already cost the United States $3,603.00 to store, and will likely cost the United States another $810.00 to store until the outcome of the appeal. The United States is being forced to incur approximately $875.00 in additional legal expenses to defend the appeal.

Given the expenses associated with the action and the appeal and the value of the defendant automobile, Claimant Bowens should be required to post a supersedeas bond, but she has failed to do so. Thus, Bowens's motion for a stay is also in effect a motion to waive the supersedeas bond requirement. If so, Claimant Bowens should proffer evidence upon which the Court may exercise its discretion to waive this requirement.

Claimant Bowens has failed to cite any facts or law which entitle her to a stay of this Court's Judgment absent the posting of a supersedeas bond. Therefore, the Court should deny claimant's motion for a stay unless and until claimant posts a supersedeas bond in the amount of $13,000.00, to cover the value of the defendant vehicle, plus both legal and storage expenses associated with this action.

Absent the posting of a supersedeas bond, the court at the very least should take precautions to ensure the value of the forfeiture judgment by allowing the United States to proceed with the immediate sale of the defendant property and to retain the sales proceeds, which would then become the substitute *res* in this action, pending the ultimate outcome of the action.

CONCLUSION

Because claimant Bowens failed to meet the prerequisites for obtaining a stay as announced in *Garcia-Mir, supra*, and because Roberts (sic) failed to post the supersedeas bond required by Rule 62(d), plaintiff respectfully requests the Court to DENY Bowens's motion for a stay. Alternatively, plaintiff requests that if the Court grants a

stay that it condition the grant of a stay upon claimant Bowens's posting an appropriate supersedeas bond.

Respectfully submitted

Joe D. Whitley
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/s/ Nina L. Hunt
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Assistant U.S. Attorney
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75 Spring Street, S.W.
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Atlanta, Georgia 30335
(404) 331-6458

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:90-cv-1034-HTW

UNITED STATES OF AMERICA,
Plaintiff,

v.

ONE 1987 CADILLAC,
VIN No. 1G6CD5185H4237660,
Defendant.

DECLARATION OF NINA L. HUNT

I, Nina L. Hunt, declare the following:

1. I am Assistant United States Attorney assigned to the Northern District of Georgia. I am lead attorney in this action and in the related *Bivens* action, which is now also pending on appeal to the Eleventh Circuit.

2. I supplied the figures contained in this response relating to the defendant automobile's value, past storage fees, and future storage fees from facts given to me by the Marshals Service [Gena Keith, Property Management Specialist] during a telephone conversation on March 10, 1992. I estimated the amount of time to be spent on the appeal from my past experience in drafting briefs and from my particular experience with this action.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts stated above are true and correct to the best of my knowledge and belief.

This ——— day of ———, 1992.

/s/ Nina L. Hunt
NINA L. HUNT
Assistant U.S. Attorney

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 1:90-cv-1034-HTW

UNITED STATES OF AMERICA,
Plaintiff

vs.

ONE 1987 CADILLAC,
VIN No. 1G6CD5185H4237660,
Defendant

ORDER OF COURT

[Filed Apr. 17, 1992]

This matter is currently before this court on the claimant's motion to stay judgment and enforcement pending appeal. In support of her motion, claimant asserts that this proceeding is *in rem*, and that the government will dispose of the *res* unless this court grants a stay.

Fed.R.Civ.P. 62(d), however, permits courts to grant applications for stays only in cases where the claimant posts a so-called "supersedeas" bond:

> When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay. . . . The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Claimant, however, has failed to post the requisite bond authorized by Rule 62(d), Fed.R.Civ.P. Claimant like-

wise has failed to cite any facts or law to this court which would show her entitlement to the stay she requests in the absence of the pertinent bond.

District courts generally set supersedeas bonds in "the whole amount of the judgment remaining unsatisfied," plus interest, costs on appeal and damages for delay. *Popler Grove Etc. v. Bache Halsey Stuart Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979). Plaintiff's attorney has advised this court that the defendant automobile has an estimated value of $8,500.00, and costs the United States Marshals Service approximately $3.00 per day for storage. The actual storage fees to date amount to $3,603.00. The government also estimates that its defense of claimant's appeal will cost approximately $875.00. These various costs total $12,978.00, and claimant has not contested these amounts. Claimant likewise has failed to proffer evidence upon which this court might exercise its discretion to waive this requirement.

This court, therefore, after careful consideration GRANTS claimant's motion to stay judgment and enforcement pending appeal; the court CONDITIONS its grant of the stay, however, on claimant's posting the appropriate supersedeas bond, in the amount of $12,978.00, within twenty (20) days of the parties' receipt of this Order.

SO ORDERED, this 16th way of April, 1992.

/s/ Horace T. Ward
HORACE T. WARD
United States District Judge

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Docket No. 92-8219

UNITED STATES OF AMERICA,
Appellee,

vs.

ONE 1987 CADILLAC,
CHARLIE MAE BOWENS,
Claimant/Appellant.

MOTION TO STAY JUDGMENT

[Filed May 27, 1992]

The Appellant respectfully moves the Court to stay the judgment of the District Court during the pendency of this appeal.

A motion to the District Court was made and granted on such terms and conditions as are (a) irrational and (b) impossible of fulfillment because of Appellant's poverty. A copy of the District Court's order is attached.

Unless a stay is granted, the government will doubtlessly sell the *res* which is the subject matter of this appeal, thereby mooting the appeal.

Undersigned counsel believes and certifies that the appeal is meritorious and is not brought for purposes of delay.

The appeal is from a grant of summary judgment notwithstanding disputed facts. Attached is our Response to Motion for Summary Judgment and to Statement of "Undisputed Material Facts."

Respectfully submitted,

/s/ Herbert Shafer
HERBERT SHAFER
Georgia Bar No. 637200
Attorney for Appellant

432 Delmont Drive N.E.
Atlanta, Georgia 30305
(404) 266-8827

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:90-CV-1034-HTW

UNITED STATES OF AMERICA,
Plaintiff,

VS.

ONE 1987 CADILLAC, VIN NO. 1G6CD5185H4237660,
Defendant.

RESPONSE TO MOTION FOR SUMMARY JUDGEMENT AND TO STATEMENT OF "UNDISPUTED MATERIAL FACTS"

I

STANDARD OF REVIEW

What standard should the Court apply in reviewing the government's motion?

The obvious one, of course, is that of Fed. R. Civil P. 56 (c): Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c).

The party moving for summary judgment has the burden of establishing the absence of a genuine issue of material fact. *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986); *Brown v. Crawford*, 906 F. 2d 667, 669 (11th Cir. 1990); *Florida Power and Light Company v.*

Allis Chalmers Corp., 893 F. 2d 1313, 1318 (11th Cir. 1990).

In applying that standard, however, the Court should be mindful of Hodding Carter's gloomy views regarding the interrelationship between our government and the real world:

> "The nation is awash in a flood of lies, big and small. People in high places routinely lie, and if not lie, then dissemble, and if not dissemble deliberately mislead—and there are no meaningful consequences . . . . . Government officials lie and we yawn." [1]

And finally, considering the government's dismal track record for veracity, it might be useful for the Court to adopt as a paradigm the highly regarded betting line of Jack Frangis, the Barbary Coast's (Las Vegas) premier oddsmaker, on the following proposition:

> Proposition: Whenever the government submits any motion or other document, it will contain (a) lies, (b) distortions, (c) be riddled with dissembling, (d) be misleading and (e) be evasive:

BARBARY COAST BETTING LINE
(PER JACK FRANGIS)
GOVERNMENTAL CHICANERY

	ODDS
OUTRIGHT LIES	2 - 1
DISTORTIONS	15 - 1
DISSEMBLING	8 - 1
CASUISTRY	20 - 1
EVASION	OUT [2]

---

[1] "A Confederacy of Lies, Guarded by a Yawning Watchdog," *Wall Street Journal*, 25 January 1990, A 15.

[2] The term "out" in this context means that the likelihood against there being no evasions is so slim, the house will not accept any wagers thereon. For example, whenever Joe Louis fought some of

II

RESPONSE TO STATEMENT OF MATERIAL FACTS

(1)

Charlie Mae Bowens accepts the fact that her car was seized by, among others, D.E.A. Agents.

(2)

Charlie Mae Bowens accepts the fact that her car was seized during the execution of a state search warrant for drug-related evidence at 2004 Echota Way, Riverdale, Georgia, Charlie Mae Bowens's address. She adds that not a grain of such evidence was discovered or seized.

(3)

Charlie Mae Bowens accepts the fact that the search warrant was executed incident to the investigation of her son Ernest Swain for drug-related evidence. She adds that her son did not reside there and the search of her home was pretextual.

(4)

Charlie Mae Bowens is the titled and registered owner of the Cadillac.

(5)

Charlie Mae Bowens *now* has cataracts and *now* is unable to see well enough to drive. She adds that in 1986 and 1987 she was perfectly able to, and did, drive.

(6)

Charlie Mae Bowens disputes that she was unable to see well enough to drive a car at the time it was purchased. (See 5, above.)

---

the stumblebums his matchmaker, Joe Jacobs, came up with, the oddsmakers would post an "out" line, i.e., no wagers accepted.

(7)

Charlie Mae Bowens accepts the fact that she is the mother of Ernest Swain and Jacquelyn Swain Morgan, both of whom plead guilty to violations of Georgia's Controlled Substances Act in October 1989.

(8)

Charlie Mae Bowens disputes the facts in Paragraph #3 of the motions for summary judgment.

(9)

Charlie Mae Bowens disputes the facts in paragraph #4 of the motion for summary judgment.

(10)

Charlie Mae Bowens disputes the facts in paragraph #5 of the motion for summary judgment.

Respectfully submitted,

HERBERT SHAFER
Georgia Bar No. 637200
Attorney for Defendant

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(404) 266-8827

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:90-CV-1034-HTW

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ONE 1987 CADILLAC, VIN No. 1G6CD5185H4237660,
Defendant.

COUNTY OF GWINNETT

STATE OF GEORGIA

AFFIDAVIT

ERNEST SWAIN, being duly sworn, deposes and says:

On 27 December 1990, a nice government lady, who introduced herself as Nina L. Hunt, took my deposition. I am told that she has used selective extracts from that deposition in order to establish that the car stolen from my mother, Charlie Mae Bowens, back on July 27, 1989, was (a) purchased with drug proceeds and (b) belongs to me and not to her.

However, even though I told the nice government lady that (a) the money used to purchase the car was *not* derived from any drug-related activity, (b) that the money used to buy the car was derived from entirely legal sources, and (c) that the car was purchased for and is owned by my mother, not me, none of these facts has been disclosed to the Court. So, in order that the Court fully understand the matter, what follows is a

verbatim recitation of the sworn responses I made to the nice government lady's questions:

(1)

Q: At the time of your arrest [in 1989], where were you living?

A: I was living in Milledgeville.

Q: What address there?

A: 284 Log Cabin Road.

Q: All right. Now, I believe, unless I'm incorrect, you were arrested, were you not, at 2004 Echota Way in Riverdale, Georgia?

A: No, that's incorrect. I was arrested in East Point jail. I went to jail to see about my sister and they arrested me at the jail.

[4-5 Deposition.]

Q: Who resides at 2004 Echota Way?

A: My mother.

Q: And what's her name?

A: Charlene (sic) Mae Barnes (sic).

Q: Does anybody else reside there?

A: My sister lived there but she wasn't living there at the time.

Q: How about you?

A: No. I stayed there sometimes but I lived with my wife. —

Q: And that's the Milledgeville address that you just mentioned, right?

A: At that time I was, yeah.

[5 Deposition.]

Q: When was the last time that you and your mother resided together at that address?

A: When I really—When I first got out of prison, that was in '82, I stayed with her a while at Washington Circle in East Point.

Q: Was that the last time you regularly resided with your mother?

A: Yes . . .

Q: During the time that you were residing with your mother at the Washington Circle address, were you ever present when your mother sold any narcotic drugs to anyone?

A: To my knowledge, my mother never sold any narcotics.

Q: Now I'm going to ask you a few questions about the purchase of this 1987 Cadillac that's at issue in this case. Do you know the Cadillac to which I refer?

A: Yes.

Q: To whom does the Cadillac Belong?

A: To my mother. . . .

Q: . . .

A: Some of her money went toward it. Really, that was her money after my grandmother died. My uncle from Ohio that played with the Ohio Players was Ralph Middlebrooks, and at the time he played with the Ohio Players he might have had four or five gold albums. So he gave his mother money, which was my grandmother's. When my grandmother got so sick, my grandmother moved with her and there was some money left from my mother that my uncle had gave to my mother. . . .

[7 Deposition.]

Jackie came up with some money, I came up with some money and we called my uncle in Detroit and he came up with 3 or $4,000.00 and we all bought the car together. I mean, I had I think about $6,000.00 I put in the car.

Q: All right. Now, the money that you put in the car, did that come from the proceeds of sales of Schedule 2 controlled drugs?

A: No.

Q: Where did you get the money?

A: Well, I got about 25 hundred dollars of it from my wife and the rest of the money I got from the restaurant that we was running at the time.

Q: Where was this restaurant located?

A: In Milledgeville.

Q: What was the name of it?

A. Swain's Fish and Chicken.

Q: Where was it located?

A: On Wayne Street in Milledgeville, Georgia.

Q: How long did you operate the restaurant?

A: I managed the restaurant about close to a year.

Q: Okay. Now, you say you managed the restaurant. Were you not the owner of the restaurant?

A: Well, me and my sister and my wife, really, we went in together. But my sister had more money in it than anybody else. She was working for the State at the time.

[8 Deposition.]

Q: You say you went into it together. Were you then a part owner of the restaurant?

A: Yes.

Q: Okay. If you will, explain to me—well, first let me ask you this. Was the restaurant set up as a corporation?

A: It was just Swain's—it was my sister owned it. I didn't say anything about what I owned. We just went in together I don't think we did any kind of paper to represent who had how much or what. I managed the restaurant because she was working in Atlanta, so she couldn't manage it. After my grandmother died she had explained to my mother that she wanted to give me so much money and my sister so much money. My sister went in about $6500.00. But the main reason we wanted the car was that it was dependable. My uncle said and all my other uncles said.

See, my mother, she just one girl. All of the rest are her brothers. And they said they wanted her to have a car to go back and forth because she had glaucoma. And they wanted to get her a nice car. And my sister come up and so me and my wife and my sister drove to Detroit. We had a '79 Buick at the time and my uncle had drove the car back.

He purchased the car because he'd been in Detroit . . .

[9 Deposition.]

. . . about 30 some years and said he could get it cheaper because he worked for General Motors. I think he retired from General Motors. He said you could get a car cheaper in Detroit than you can in Georgia. So that's how this come about.

Q: All right. Let me ask you this. I think I heard you say that you bought the car—

A: Well, I think the car was 27 or $30,000.00 I never had that much cash money at one time in my life.

Q: At the time that the car was purchased your mother could not see well enough to get a Georgia driver's license, could she?

A: I don't think she could see well enough to drive, but she already had a license. She got a license, you know.

Q: Are you positive of that?

A: Yes, my mother has a license.

[10 Deposition.]

Q: All right. And it's your understanding that a substantial or let me see if I understand this. What you're telling me today is that of the amount that you took from Atlanta to Detroit, roughly $10,000 of that money had originally come from Frank Middlebrooks in the first place?

A: No, Ralph Middlebrooks, the one in Ohio. Ralph Middlebrooks is the one I referred to that played with the Ohio Players.

Q: That's another brother?

A: Right. He stayed in Dayton, Ohio.

Q: And what you're telling me is that Ralph Middlebrooks gave your grandmother, who is now deceased, a certain amount of cash money; is that correct?

A: Yeah. A lot of cash money over the years. It was more than 10 thousand. He might have gave her 50 or 60. The man was rich. My mother gave me some after my grandmother died. I don't know how much he gave her, but you can ask him.

[11 Deposition.]

Q: Did you use this car on any occasion to transport illegal drugs?

A: Never.

Q. Did you use this car on any occasion to conceal illegal drugs?

A: No.

Q: Did you use this car on any occasion to drive to a place where you transacted an illegal drug transaction?

A: No.

Q. Did you use this car to carry drug proceeds to pay off anybody who was selling drugs for you?

A: No, ma'am. that's my first knowing that I been accused of that. I didn't know I was accused of dealing drugs from that particular car.

[19 Deposition.]

None of this has been disclosed to the Court by the nice government lady, but it should be disclosed, 'cause it might be relevant to the issues in this case.

FURTHER AFFIANT SAYETH NOT.

AFFIANT, ERNEST SWAIN

Sworn to and subscribed
before me this
day of ———, 1991.

Notary Public

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal No. 92-8219

District Court No. 1:90-cv-1034-HTW
UNITED STATES OF AMERICA,
Appellant-Plaintiff,

vv.

ONE 1987 CADILLAC, VIN NO. 1G6CD5185H4237660,
and CHARLIE MAE BOWENS,
Appellant-Claimant.

RESPONSE TO MOTION TO STAY JUDGMENT

The United States opposes appellant's Motion to Stay Judgment because appellant has failed to meet the prerequisites for obtaining a stay and she has failed to post a supersedeas bond in accordance with the requirements of Federal Rule of Civil Procedure 62(d).[1]

In the district court, appellant filed a motion to stay judgment and enforcement pending appeal which the United States opposed on grounds that appellant failed to meet the prerequisites for obtaining a stay and failed to post the supersedeas bond required by Rule 62(d). Since appellant failed to present any facts or any law to the district court upon which it could excuse a bond requirement, the district court granted the motion to stay on condition that appellant file a supersedeas bond

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[1] A Certificate of Interested Persons is being filed with this Response to Motion for Stay of Judgment in accordance with 11th Cir. R. 28-2(b).

in the amount of $12,978.00, within twenty days of receipt the district court's order, dated April 16, 1992. The bond amount was set to cover the value of the defendant vehicle, plus both legal and storage expenses associated with this action, which are reflected by the record in support of the United States' response to the motion to stay. Appellant did not file a supersedeas bond in the district court, nor did she respond to the April 16, 1992, order by offering any evidence to support waiver of this requirement.

Her application to the appellate court is similarly devoid of any support for a stay.

A. Appellant is not entitled to a stay.

When an appellant makes an application for a stay pursuant to Rule 62(d), the Court must make the following inquiry: (1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the party opposing the stay; and (4) whether granting a stay lies within the public's interest. *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). *See also Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed. 2d 724 (1987) (applying the civil stay prerequisites to a habeas corpus).

"Ordinarily the first factor is the most important." *Garcia-Mir, supra*, 781 F.2d at 1453. A finding that the movant demonstrates a probable likelihood of success on the merits requires a determination that the district court's decision was clearly erroneous. *Id.* Appellant's motion for stay, however, fails to cite any facts or law which demonstrate that the district court's decision granting the United States' summary judgment motion was clearly erroneous.

A claimant who seeks to stay the district court's decision in a forfeiture action pending appeal must peti-

tion the district court for permission to post a supersedeas bond, the bond requirement being subject to waiver if the claimant demonstrates indigency. *United States v. Certain Real & Personal Property*, 943 F.2d 1292, 1296 (11th Cir. 1991). Appellant has not demonstrated indigency in this case; she has shown merely that, unless a stay is granted, the United States will dispose of the *res* in this action. This is self-evident, and it is no more than the United States is permitted to do unless the district court grants the claimant's application. *Id.* Thus, the United States will also be harmed if appellant succeeds in further delaying disposition of the defendant vehicle by obtaining a stay here. Moreover, the public interest is disserved by granting a stay because further delay diminishes the value of the defendant vehicle and injuries the United States, which converts the assets of drug dealers to use in law enforcement.

B. Appellant's failure to post a supersedeas bond disqualifies her from obtaining a stay.

Appellant has also failed to cite any facts or law which entitle her to a stay of judgment absent the posting of a supersedeas bond. Generally, district courts set supersedeas bonds in "the whole amount of the judgment remaining unsatisfied," plus interest, costs on appeal and damages for delay, "unless after notice and hearing and for good cause the court fixes a different amount or orders security other than the bond." *Poplar Grove Etc. v. Bache Halsey Stuart Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979). Because appellant has offered no evidence upon which the Court may exercise its discretion to waive this requirement, the Court should deny appellant's motion for a stay unless and until appellant posts a supersedeas bond in the amount of $12,978.00,

to cover the value of the defendant vehicle, plus both legal and storage expenses associated with this action.

Respectfully submitted

JOE D. WHITLEY
United States Attorney

/s/ Nina L. Hunt
NINA L. HUNT
Assistant U.S. Attornuey
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United States of America, Appellee-Plaintiff v.
One 1987 Cadillac, VIN No. 1G6CD5185H4237660, and
Charlie Mae Bowens, Appellant-Claimant

Eleventh Circuit Docket No. 92-8219

CERTIFICATE OF INTERESTED PERSONS

Counsel for appellee, the United States of America, hereby certifies that the following is a complete list of interested persons:

Charlie Mae Bowens
Nina L. Hunt
Herbert Shafer
Ernest Swain
United States of America
Horace T. Ward, U.S. District Judge
Joseph D. Whitley

/s/ Nina L. Hunt
NINA L. HUNT
Assistant U.S. Attorney

May 28th, 1992.

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8219

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

ONE 1987 CADILLAC,
VIN NO. 1G6CD518H4237660,
Defendant,

CHARLIE MAE BOWENS,
Claimant-Appellant,

ERNEST SWAIN,
Claimant.

On Appeal from the United States District Court
for the Northern District of Georgia

[Filed July 17, 1992]

BEFORE: TJOFLAT, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

BY THE COURT:

Appellant's motion to stay judgment pending appeal is denied.

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal No. 92-8219

District Court No. 1:90-cv-1034-HTW

UNITED STATES OF AMERICA,
Appellee-Plaintiff,

v.

ONE 1987 CADILLAC, VIN NO. 1G6CD5185H4237660,
Defendant,

CHARLIE MAE BOWENS,
Appellant-Claimant.

PLAINTIFF-APPELLEE'S MOTION TO DISMISS APPEAL

The United States, plaintiff-appellee [hereafter "the United States"] moves this Court to dismiss this appeal on the basis that this Court no longer has jurisdiction over the defendant *res* in that the forfeited defendant 1987 Cadillac was sold by the United States Marshal for the Northern District of Georgia August 5, 1992.

After judgment, on February 26, 1992, claimant-appellant Bowens [hereafter "claimant Bowens"] requested a stay of the judgment to prevent the United States from selling the forfeited defendant 1987 Cadillac and, thus, from divesting the appellate court of jurisdiction over this appeal. R1-43. The district court ordered that any stay be contingent upon claimant Bowens posting a bond or demonstrating indigency. R1-46. Thereafter,

on May 27, 1992, claimant Bowens filed a motion for a stay of judgment in the Eleventh Circuit. This motion was denied on July 17, 1992.

The United States asks this Court to judicially note[1] the records of the district court below in which the Marshal has filed a return showing the sale of the defendant Cadillac on August 5, 1992.

It is well settled in this Circuit that an appellate court is divested of jurisdiction over the *res* in a civil forfeiture action if the *res* is removed from the jurisdiction of the court, by sale or otherwise, while the action is on appeal. *United States v. Certain Real & Personal Property*, 943 F.2d 1292 (11th Cir. 1991); *United States v. One Lear Jet, Serial No. 35A-280*, 836 F.2d 1571 (11th Cir.) (en banc), *cert. denied*, 487 U.S. 1204, 108 S.Ct. 2844, 101 L.Ed.2d 881 (1988); *United States v. One Single Family Residence*, 932 F.2d 1433 (11th Cir. 1991). *Accord*, *United States v. 66 Pieces of Jade*, 760 F.2d 910 (9th Cir. 1985); *United States v. Tit's Cocktail Lounge*, 873 F.2d 141 (7th Cir. 1989); *United States v. $57,480.05 United States Currency and Other Coins*, 722 F.2d 1457 (9th Cir. 1984).

Other courts have also noted that loss of control over the *res* results in loss of jurisdiction by the court with respect to funds and non-permanent property. *United States v. Aiello*, 912 F.2d 4 (2d Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 757, 112 L.Ed.2d 777 (1991). For example, the Fifth Circuit, in *United States v. $79,000 in United States Currency*, 801 F.2d 738, 739 (5th Cir. 1986), states "the general rule is that the court's power derives solely from control over the defendant *res*." Additionally, so long as the release of the *res* from

---

[1] The United States requests that this Court judicially notice the records of the district court under Rule 201, Federal Rules of Evidence. *United States v. Verlinsky*, 459 F.2d 1085, 1089 (5th Cir. 1972).

the control of the court was not done accidentally, fraudulently, or improperly, the release or removal of the *res* from the court's control terminates jurisdiction. *United States v. $2,490.00 in United States Currency*, 825 F.2d 1419, 1420 (9th Cir. 1987).

Given this Court's prior holdings as to the loss of jurisdiction once control over the *res* is lost, it is evident in rem jurisdiction no longer exists. Once a court has determined that jurisdiction does not exist over a case, it must be dismissed for lack of jurisdiction. *Certain Real and Personal Property*, 943 F.2d at 1294.

CONCLUSION

Because claimant Bowens failed to meet the prerequisites for obtaining a stay, the forfeited automobile has been sold, and this appeal should now be dismissed for lack of jurisdiction.

Respectfully submitted

JOE D. WHITLEY
United States Attorney

/s/ Nina L. Hunt
NINA L. HUNT
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Suite 1800
Atlanta, Georgia 30335
(404) 331-6458

APPENDIX O

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Docket No. 92-8219

UNITED STATES OF AMERICA,
Appellee,

vs.

ONE 1987 CADILLAC, CHARLIE MAE BOWENS,
Claimant/Appellant.

MOTION TO STAY DECISION ON MOTION TO DISMISS

Appellant respectfully moves the Court to stay decision of Appellee's motion to dismiss until and after the Supreme Court decides *Republic National Bank of Miami v. United States,* (No. 91-767), granting cert to review this Court's decision, 932 F.2d 1433.

The question before the Supreme Court, i.e., whether an intervening sale of a chattel seized for forfeiture ousts the Court of Appeals of jurisdiction, is the same question before this Court.

Respectfully submitted,

/s/ Herbert Shafer
HERBERT SHAFER
Georgia Bar No. 637200
Attorney for Appellant

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Atlanta, Georgia 30305
(404) 266-8827

APPENDIX P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8219

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

ONE 1987 CADILLAC, VIN NO. 1G6CD5185H4237660,
Defendant,
CHARLIE MAE BOWENS,
Claimant-Appellant,

ERNEST SWAIN,
Claimant.

On Appeal from the United States District Court
for the Northern District of Georgia

[Filed Dec. 18, 1992]

ORDER:

Appellant's motion for stay of further appellate proceedings pending disposition by the United States Supreme Court in *Republic National Bank of Miami v. United States of America* is DENIED AS MOOT.

/s/ J.L. Edmondson
J.L. EDMONDSON
United States Circuit Judge

No. 92-1452

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHARLIE MAE BOWENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction over an appeal from an *in rem* forfeiture proceeding after the *res* was released from the district court's control and sold.

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1452

CHARLIE MAE BOWENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1992. The petition for a writ of certiorari was filed on March 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 11, 1990, the United States filed an *in rem* action in the United States District Court for the Northern District of Georgia seeking forfeiture

under 21 U.S.C. 881 of a 1987 Cadillac automobile. The complaint alleged that petitioner's son, Ernest Swain, was the true owner of the Cadillac and that Swain had purchased the automobile with the proceeds of drug trafficking. Pet. App. 7a-12a. Petitioner filed a claim asserting that she was the true owner of the automobile and denying that it had been purchased with the proceeds of drug trafficking. Pet. App. 14a-16a.

The United States moved for summary judgment. On February 14, 1992, the district court granted the government's motion. The court relied on (1) deposition testimony of Ernest Swain that he had provided a portion of the cash used to purchase the Cadillac, (2) Swain's 1989 conviction in Georgia state court for drug trafficking offenses, (3) Swain's admission that his mother did not drive the automobile, and (4) petitioner's failure to show any legitimate source for the funds used to purchase the automobile. The court concluded that the United States had "made a sufficient showing that Swain used drug proceeds to purchase the car, and then placed its title in his mother's name in an effort to conceal its origin." Pet. App. 29a-31a.

2. Petitioner filed a notice of appeal and sought a stay in the district court of the district court's order granting summary judgment. On April 17, 1992, the district court granted the stay on condition that petitioner post a supersedeas bond, as required by Federal Rule of Civil Procedure 62(d). Petitioner failed to post a bond. Instead, on May 27, 1992, she filed a motion for a stay in the court of appeals asserting that a stay was necessary to prevent the

United States from selling the *res* and depriving the court of jurisdiction. On July 17, 1992, the court of appeals denied that motion. Pet. App. 62a.

On August 5, 1992, the United States Marshal sold the Cadillac. Subsequently, the government moved to dismiss petitioner's appeal on the ground that the sale of the *res* had deprived the court of appeals of jurisdiction. Pet. App. 63a-65a. The court of appeals granted the motion. Pet. App. 1a-2a. It relied on its decision in *United States* v. *Certain Real & Personal Property*, 943 F.2d 1292 (11th Cir. 1991), which held that the transfer of the *res* from the district where the forfeiture action was brought after a valid decree of forfeiture ends the power of the court over the property and deprives the court of appeals of jurisdiction. *Ibid.*

ARGUMENT

Petitioner asks (Pet. 5-6) the Court to grant the petition for a writ of certiorari in light of *Republic National Bank* v. *United States*, 113 S. Ct. 554 (1992). Because the decision in *Republic National Bank* rejected the reasoning on which the court of appeals relied in dismissing petitioner's appeal, we agree with petitioner that the court of appeals' judgment should be vacated and the case remanded to the court of appeals.

In *Republic National Bank*, as in this case, the district court granted judgment for the government on a complaint seeking *in rem* forfeiture of property in which the petitioner claimed an interest. The claimant filed a timely notice of appeal, but failed to file a supersedeas bond or obtain a stay of the district court's judgment. The government transferred the

res from Florida to the United States Treasury, and then moved to dismiss the appeal on the ground that the removal of the *res* from the judicial district where the action had been brought deprived the court of appeals of jurisdiction. The court of appeals granted the motion and dismissed the appeal. This Court reversed and remanded. The Court held that "in an *in rem* forfeiture action, the Court of Appeals is not divested of jurisdiction by the prevailing party's transfer of the res from the District." 113 S. Ct. at 559-560.

The reasoning of *Republic National Bank* is applicable in this case. Here, as in *Republic National Bank*, the court of appeals relied on the removal of the *res* from the control of the district court as a ground for dismissing the claimant's appeal. That reasoning in no longer valid in light of the Court's decision in *Republic National Bank*. Accordingly, the Court should vacate the court of appeals' decision and remand for further proceedings consistent with *Republic National Bank*.

CONCLUSION

The petition for certiorari should be granted, the decision of the court of appeals should be vacated, and the case should be remanded for reconsideration in light of *Republic National Bank* v. *United States*, 113 S. Ct. 554 (1992).

Respectfully submitted.

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